No. 1375

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PACIFIC MAIL STEAMSHIP COMPANY,
Appellant,

vs.

ALFRED IVERSON, JOHN KENNEDY, PATRICK MURPHY, THOMAS ROE and GEORGE MORRISSEY,
Appellees.

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APPELLEES' BRIEF.

GEO. A. DAVIS,
Proctor for Appellees.

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STATEMENT OF THE CASE.

On October 30, 1905, (Tr. p. 12,) Alfred Iverson filed his libel against Pacific Mail Steamship Company alleging that it was and is a corporation duly incorporated under the laws of the State of New York, and that said corporation owned and controlled the Steamship "Mongolia," a regular passenger and freight steamer sailing between the port of San Francisco, California, U. S. A., and certain ports and places in the Empires of Japan and China, and from said last ports and places to said

San Francisco, and that said corporation was and is the owners and controlled and operated said steamship at all times stated in the Libel; that the Libellant on the 16th day of October, A. D. 1905, being then at the port of Yokohama, Japan, applied to the Libellee for a passage from Yokohama to San Francisco on the said Steamship "Mongolia," which was then about to leave the port of Yokohama for San Francisco, and that the appellant corporation agreed to receive and accept the Libellant as a passenger on board the Steamship "Mongolia" and to convey and carry him from Yokohama to San Francisco on the S. S. "Mongolia;" that on October 18, A. D. 1905, the said corporation received the said Iverson on board the S. S. "Mongolia" and undertook and agreed to convey Iverson with all convenient speed by the S. S. "Mongolia" from Yokohama to San Francisco; that on October 20, 1905, the appellant issued to said Iverson a steerage check or ticket which was in the words and figures following:

"2—105—3M S G 63

"Pacific Mail Steamship Company

"Steerage Check

"Steamer Mongolia Voy 7

"Name A. Iverson

"From Yokohama to San Francisco

"No. Ticket 9104 A. E. Rennie, Purser.

"Good for this trip only. To be shown and returned when "called for."

It appears that the S. S. "Mongolia" left Yokohama for San Francisco on or about the 18th day of October, 1905, and that the Libellant was on board as a passenger, and that the "Mongolia" with Libellant on board arrived at Honolulu on or about October 27, 1905, and that the said Steamship stopped

at Honolulu to land freight and passengers, and take freight and passengers from Honolulu to San Francisco.

It further appears that the "Mongolia," being about to leave Honolulu on or about the 28th day of October, 1905, for San Francisco, continuing her voyage, the Libellant, who went ashore at Honolulu upon the arrival of the "Mongolia," was about to rejoin the S. S. "Mongolia," when the appellant by its servants and agents refused him permission to rejoin the ship to go to San Francisco, and the "Mongolia" left Honolulu without Libellant.

It appears from the Libel that the said Iverson was a passenger when he landed at Honolulu, and it is alleged that he did all he was lawfully required to do in order to rejoin said S. S. "Mongolia," but that the appellant, by its servants and agents, prevented him from rejoining said S. S. "Mongolia" in violation of its contract and duty and for the breach of duty and contract he claimed One Thousand Dollars damages. (Tr. pp. 12, 13, 14, 15, 16 and 17.)

The appellant appeared and answered the Libel admitting the allegations of paragraph 1 and admitted that it accepted the Libellant as a passenger (Tr. pp. 20, 21). The answer admits issuing the steerage check to Libellant; admits allegation of paragraph 4 of the Libel (Tr. p. 21). The answer denies that Libellant proceeded to go on board the "Mongolia" at Honolulu in accordance with any contract or agreement. It also appears from the answer, and is alleged, that Libellant did not do what he was lawfully required to do in order to go on S. S. "Mongolia," or that he presented himself within a reasonable time before the sailing of the S. S. "Mongolia" from Honolulu, and denies refusal of the appellant to take Iverson on board under any contract. The 6th paragraph of the answer sets forth, after admitting that Iverson was left at Honolulu, that

it has not sufficient information to admit or deny that Iverson was without money or means, and denies the allegation of the Libellant suffering wrong and indignity (Tr. pp. 20, 21, 22). In the 7th, 8th and 9th paragraphs of the Libellant's answer in substance alleges that Iverson in August, 1905, signed articles as a seaman on appellant's Steamship "Barracouta" for a nine months' voyage to an unknown port in Siberia: that he joined the "Barracouta," and that she was captured by the Japanese, and that Libellant was brought before a Japanese Court, discharged by that Court, and that on the 16th day of October, 1905, the appellant, at the instance of the captain of the "Barracouta," took Libellant on board the S. S. "Mongolia" intending to transport him and the rest of the crew of the "Barracouta" to San Francisco, alleging that nothing was paid for transportation, and that appellant offered to convey Libellant to San Francisco by the S. S. "China" 8 days after the sailing of the "Mongolia."

It is also alleged in the 8th paragraph of said answer that before the arrival of the "Mongolia" in Honolulu, the Libellant was given notice not to leave the "Mongolia" on account of an order of the U. S. Marine Hospital Service, but that Libellant did go ashore and that the reason appellant would not allow Libellant to rejoin the S. S. "Mongolia" at Honolulu was that the U. S. Marine Hospital Service would not issue a clean Bill of Health to said "Mongolia" (Tr. pp. 22, 23, 24).

The 9th paragraph of the answer alleges that "even under the contract claimed to exist between Libellant and Appellant, and even assuming that Libellant was taken on board the 'Mongolia' by Libellee as a passenger to be transported from Yokohama to San Francisco" that there was no obligation to permit Libellant to go ashore at Honolulu, and that Libellant went

ashore of his own volition in violation of the orders of the servants and agents of the appellants (Tr. p. 25).

The cases of John Kennedy, Patrick Murphy, Thomas Roe and George Morrissey are similar and the Libels, Answers and Evidence in support thereof are substantially the same. These suits came on regularly for trial before the U. S. District Court, Judge Dole presiding, and after hearing all the evidence, he rendered a decision awarding the Libellants $150 damages each and the costs. (Tr. pp. 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465.)

ARGUMENT.

The first assignment of Error.

"The Court erred in finding that all the material allegations in the respective Libels herein are true."

It is submitted and contended that there can be no question that the Libellants were at Yokohama in Japan, and joined the S. S. "Mongolia" as passengers on or about the 18th day of October, A. D. 1905, bound on a voyage from Yokohama to San Francisco, and that they arrived at Honolulu on the 27th day of October, 1905, and that they had a legal right to land at Honolulu, an American port. Iverson did not go ashore at Honolulu for 2 hours after the "Mongolia" was moored. (Tr. p. 121.) How long after she was moored did you go ashore? Ans. Well about two hours and a half or two hours. Ques. You came ashore here in Honolulu? Ans. Yes sir. Ques. Did anybody make any objection to you coming ashore? Ans. No, sir. (Tr. p. 121.) Iverson is positive that no notice or orders of any kind were given or issued aboard the Steamship that were brought to his knowledge about not going on shore.

Patrick Murphy corroborates the testimony of Iverson as to no notice not to leave the Steamship being given (Tr. p. 173).

Q. When you started to leave the "Mongolia" did anybody make any objection to your going off? A. No, Sir, no one spoke to me.

John Kennedy also corroborates the testimony of Iverson as to no notice being given to leave the Steamship. (Tr. p. 206.) Q. Did anybody make objection to your coming ashore? A. No, Sir.

George Morrissey corroborates the testimony of Iverson in reference to no notice being given not to leave the Steamship. (Tr. p. 246.) Q. Before you left the vessel in Honolulu, did anybody try to prevent your going ashore? A. No.

Thomas Roe in answer to a question about notice not to leave the vessel at Honolulu answered: A. No, Sir, No one said a word (Tr. p. 266).

It is true that these several witnesses are the Libellants in the several suits, but their character, demeanor and the weight to be given to their testimony was peculiarly within the province of His Honor, the U. S. District Judge. The examination of counsel did not in any way weaken the evidence given by them.

Charles A. Miller testified for the appellant as to notice not to go ashore and in answer to Q. 56, T. p. 284, And you heard him telling them not to go ashore? A. Yes, Sir, I heard him telling them on several occasions. This witness, an employee of the Pacific Mail Steamship Company, testified that the "Barracouta" had been chartered by Barneson, Hibberd and Company. (Tr. pp. 291 and 218.) Did you hear the steward talking to Mr. Iverson? A. Not to Mr. Iverson directly. (Tr, pp. 293 and 294.) I will put the question direct to you: Did you hear the steerage steward tell that man, Iverson, not to go ashore? A. No. I could not say. It seems that his testimony on the question of notice is of no value.

Harry Jensen, witness for the appellant, testified that he saw three foreigners, Mexicans or Spaniards, steerage passengers, go ashore. They went up town and they came back and were allowed on the "Mongolia." (Tr. p. 303.) He also testified that "all the white men were refused" and I saw the other three come on board. (Tr. p. 304.) His testimony makes strongly for the appellees in this suit and especially see Tr. p. 308.

It is true that Harry Jensen testified that the quartermaster refused to allow him to go through the gate (Tr. p. 308). A. The quartermaster told me I could not go. But he also testified that the steerage steward said nothing to him about not going ashore. (Tr. p. 307.)

Tr. pp. 317 and 242. Did he say anything to you about going ashore then? A. Not a word.

The cross-examination of J. Ramo clearly demonstrates that he did not hear or know of notice not to go on shore being given to the Libellants in this suit. (Tr. pp. 313, 314.)

T. De La Torre, a witness for the appellant, on cross-examination states positively that he did not hear any person give notice to the Libellants not to go on shore at Honolulu. (Tr. pp. 319, 320.)

Francisco Guardado, a witness for the appellant, did not hear any one on the "Mongolia" notify the Libellants not to go on shore at Honolulu. (Tr. p. 324.)

Q. 27. You do not know whether the steward told them or not? A. No, Sir.

Louis Alonzo, a witness for the appellant, does not understand English, and was sick and laid up in his bunk at Honolulu. His testimony does not help the case of the appellant as to notice. (Tr. pp. 325, 326.)

Edward Rosas, a witness for the appellant, does not attempt to say that the appellees were notified not to go on shore at Honolulu.

Tr. p. 28, Q. 27. Nor Morrissey nor Roe? A. No. I was on deck and did not see nobody.

It is unnecessary, it seems to me, to further, by citing specific questions and answers, review the testimony of the different witnesses called to prove notice to these Libellants not to go on shore at Honolulu, and the great weight of the testimony is with the appellees that no such notice was given them; and the finding of the U. S. District Judge that "the weight of the "evidence is entirely on the side of the Libellants on this point "and I find that they were not notified of the Marine Hospital "regulations against going ashore. They gave their testimony "with apparent readiness and frankness and no weakness was "developed in it by the skillful cross-examination that some of "them went through." (Tr. p. 461.) I leave the subject of notice.

The Libellants were left in Honolulu without money or funds; were compelled to sleep in the open air and but for the assistance of Charles F. Chillingworth would have been unable to satisfy their hunger, yet the "Mongolia" departed with the three Spaniards on board according to the testimony of their own witness. See the testimony of Chillingworth, Tr. p. 93. Q. What took place? "I knew this man Iverson some years pre-"vious and he said they had been put off the 'Mongolia' and did-"n't have any place to sleep and no place to eat, and after hearing "what they had to say, I went to your office and stated the facts "to you and then I wrote a note to the Palace Grill that I would "be responsible for their food, and Captain Bray said he would "have to put them out unless something was paid for their room."

Chillingworth paid out and became responsible for $142.00 for these Libellants. (Tr. p. 94.) Q. That is how much altogether that you agreed to pay? A. About $142.00.

The relation of carrier and passenger has been established. What stronger evidence that the steerage checks given to each of the Libellants by the Purser of the "Mongolia" three days after leaving Yokohama? (See Plaintiffs' Exhibits. Tr. pp. 120, 243, 245, 172, 266.) These checks were given in exchange for tickets; whether the Captain of the "Barracouta" or the U. S. Consul at Yokohama paid for the tickets of these Libellants does not appear, but it does appear if they were not paid for the appellant could easily have proven, but it has not done so, but it makes no difference whether the tickets were paid for or not. (See the *Philadelphia and Reading Railroad Co. v. Derby*, 14 Howard 468, at p. 509.) "The confidence induced by undertaking any service for another is a sufficient legal consideration "to create a duty in the performance of it." (See also *Coggs v. Bernard,* and cases cited in 14 Smith's leading cases 95.)

Waterbury v. New York Cent., Etc., R. R. Co., 17 Fed. Rep. 671.

Todd v. Old Colony, Etc., R. Co., 3 Allen 18.

Austin v. Great Western R. R. Co., L. R. 2, Q. B. 442.

Rose v. Des Moines Valley R. R. Co., 39 Iowa 246.

See *The Moses Taylor, Plaintiff-in-Error, v. Wilson Hammons,* 71 United States, 411.

"An agreement to transport a man or horse over the ocean "is a maratime contract and comes under the admiralty and "maritime jurisdiction, and it matters not whether the ship on "her voyage stops at Bermuda, Cape Horn or Panama." 71 U. S. 397.

II.

The Libellants had named the S. S. "Barracouta," engaged in carrying contraband of war, which steamship was owned by the appellant and under charter to Barneson, Hibberd and Company, and the charterers paid these Libellants their wages. Charles A. Miller, a witness for the appellant, so testified. Q. 2 105, Tr. p. 300. Who paid you, do you know? A. The clerk from Barneson, Hibberd and Company. They risked their lives in this hazardnous undertaking, and the appellant, who chartered its steamer no doubt was well paid for her. The transaction and what took place about the tickets and under what circumstances they were supplied is not disclosed by the evidence. The appellant has chosen to remain silent. If Barneson, Hibberd and Company paid the men their wages, no doubt they paid the appellant for the tickets. The purser of the "Mongolia" was on the stand as a witness for the appellant but was not asked about how and under what circumstances the tickets were given to these passengers. The allegation contained in the 7th paragraph of appellant's answer, "that neither Libellent nor "any one else paid anything for said transportation or any part "of it," (Tr. pp. 37, 38,) is entirely unsupported by any testimony. The Libellants had lawful right to go on shore at Honolulu, they were not prisoners, but passengers on an American steamship, and after being on the sea for nine days, they went on shore for exercise and recreation. They violated no duty or obligation by so doing. That the officers of the "Mongolia" allowed all first class passengers to land at Honolulu and go where they pleased seems strange indeed. An order to the steerage passengers to remain on the vessel was imprisonment without due process of law, and the Supreme Court of South Dakota, in the case of *State of South Dakota v. D. G. Butts, plaintiff-in-error,* held "a criminal information which simply

"alleges that accused did openly disobey a quarantine order of "the County Superintendent of Health prohibiting him from "going upon the street. By his so going upon the street states "no offence because it does not show that accused was informed "or had any knowledge that such an order had been made. Such "an order is unlike a general law, knowledge of which is im- "puted to every one." Case decided March 2nd, 1893, and reported in 19 Lawyers Reports Annotated, 725.

Before these quarantine regulations could have the force of law to restrain the Libellants of their liberty, they must have had actual notice and the notice must have been posted up in the steamship.

The learned District Judge says on p. 461 of the Tr.: "It "certainly would have been a practical and easy matter in an "important regulation of this kind that the steward should have "taken the list of passengers and looked up the persons corre- "sponding to each name on the list, notified them, and checked "them off, and if he had taken a waiter or some one acquainted "with the steerage passengers as a witness with him, it would "have made his work and the means of proving it satisfactory."

III.

The Libellants went back to the wharf on the 27th day of October, 1905, after seeing the purser, and were ready to be fumigated, if required. They were refused admission by the officers of the S. S. "Mongolia" (Tr. p. 148), and also at or before 9 o'clock on the morning of the 28th day of October, 1905, before the vessel left Honolulu. The steamship sailed at 11 a. m., on the 28th day of October, 1905, the Libellants were refused admission to the dock or on board the "Mongolia" and she sailed away without the Libellants. The testimony of all the Libellants corroborates this evidence of Iverson. They also

went back to the dock at 9 p. m. on the evening of the 27th day of October, 1905.

The decision of the U. S. District Judge, at pp. 462, 463, of the Tr. states the facts as proved and is relied on by me in this Brief. See the testimony of F. W. Klebahn at pp. 419 and 420 Tr. that he could not get the doctor. These Libellants did all they were required to do to rejoin the S. S. "Mongolia". 'Tis passing strange that all the first class passengers were wandering about Honolulu and the Purser of the Steamship also, and none of them were fumigated. In times of pestilence and when contagious diseases are rife in the land, no distinction is made as to persons. The fact is there was no danger in walking the streets of Honolulu at that time, and no one from the "Mongolia" caught the plague, nor ran any risk of catching it.

These regulations of the quarantine health officers is open to the serious objection that they were not general in their operation upon the subjects to which they related. All first class passengers and officers of the "Mongolia" were allowed on shore to go where they pleased, while the steerage passengers were to remain on board. See *Compagnie Francaise, Etc., v. Louisiana State Board,* 186 U. S. 393; *Deat v. Virginia,* 129 U. S. 124. If legislation is open to the objection that it is not general in its operation, a quarantine regulation is certainly open to the objection, even if notice had been given, which had not.

The damages in each case have been proven and should be increased by this Honorable Circuit Court of Appeals. Some of the Libellants lost their personal belongings; they suffered hardship; they were left alone 2100 miles from San Francisco, without money and had to get back to San Francisco the best way they could. All the material allegations of the Libel were fully proven and I submit that the fourteen assignments of error have been fully answered and that there was and is no error.

The 14th assignment of error "because said decrees are contrary to law and equity, and to the facts stated and shown in the pleadings and record in said actions," has no support in this record. These Appellees joined the "Mongolia" as passengers; they received checks entitling them to a continuous passage from Yokohama, Japan, to the port of San Francisco; they were orderly and well behaved; they stood ready to comply with every lawful demand of this corporation and its servants and agents. If mistake they made in going ashore at Honolulu, they stood ready to be fumigated by the learned doctors of the Hospital Marine Service, but the doctors could not be found. They applied to the agents of the corporation for assistance and transportation and were refused.

Tr. p. 160. It was the duty of the appellant to give these Libellants a continuous safe passage from Yokohama to San Francisco on the "Mongolia," which it did not do.

Its acts by its agents were marked by harshness and cruelty, negligence and an utter disregard of the duty of a common carrier by water toward its passengers. Counsel was compelled to go from Honolulu to San Francisco in order to cross-examine the witnesses whose depositions were taken on behalf of the appellant. No other course was open to me and no time given to secure counsel. These Libellants were in destitute circumstances and I made an especial effort to try to see that their wrongs would be vindicated by the U. S. District Court at Honolulu, and I submit that the findings are in strict accordance with the proofs submitted.

Section 329, Benedict's Admiralty: "A Court of Admiralty is rather a Court of Justice." The Harriet 1 W. Rob. 192.

Benedict's Admiralty. Section 358. The Admiralty Court as before stated is bound to determine the case submitted to its

cognizance upon equitable principles and according to the rules of natural justice.

The law is well settled that the payment of fare is not necessary to create the relation of carrier and passenger. The obligation of a carrier as to the care required for the safety of a passenger is precisely the same to a passenger riding on a free pass as to those who pay fare in the absence of a special agreement by which he assumed the risk of injury from the negligence of the carrier or its servants. *In re California Nav. and Imp. Co.*, 110 Fed. 670.

The right of the Libellants to land at Honolulu after nine days on the sea is unquestioned. They had tickets entitling them to transportation from Yokohama to San Francisco. See *Schofield v. Pennsylvania Co.*, 112 Fed. 855.

The quarantine regulations of the United States Marine Hospital Service, which allowed the officers of the steamship "Mongolia" and all her first class passengers to land at Honolulu are unreasonable health regulations and invalid and such quarantine regulations are invalid on constitutional grounds because of the allowance of the first class passengers and the officers of the "Mongolia" to land; the officials of the U. S. Marine Hospital Service permitted them to land at Honolulu, and go where they pleased, and denied the right to the steerage passengers; and such quarantine regulations it is submitted, are invalid on constitutional grounds. See *Jew Ho v. Williamson et al.*, 103 Fed. 10. It is of course contended that these Libellants had at no time received notice not to leave the steamship, but even if they had received such notice, such regulations and such administration renders the regulations unconstitutional and invalid.

The voyage was not ended nor the relation of carrier and passenger terminated until the "Mongolia" arrived in San Francisco with these Libellants on board, and the steamship was

moored at the wharf. See *Prickett v. New Orleans Anchor Line,* 13 Mo. App. 436.

The testimony of F. W. Klebahn, the secretary of the agents of the appellant corporation, and a witness for the appellant, discloses the character of the treatment of the Libellants who were left in destitute circumstances in Honolulu and is what should guide this Honorable Court on appeal as to the equities in these suits. It furnishes an example of the utter disregard of the rights, duties and obligations which this corporation was under and owed to these passengers. Nothing was done toward helping them in any way, onl yan attempt to escape from the consequences of the unlawful acts of this appellant, and no sense of the high duty they owed to these men, who had manned its ship on that perilous voyage to Siberia with a cargo of salt on board, being contraband of war. Had the charterers got this cargo safely to the port of destination in Siberia, they would have reaped a rich reward. The disappointment of having the vessel captured by the Japanese may have been commu nicated to the agents at Honolulu. At all events there was utter disregard of the duty the corporation appellant owed to these American seamen and passengers.

Tr. p. 436. Q. Did you tender these men or offer these men any money to provide themselves with the necessaries of life? A. I did not give them any. Q. Did you offer them any money? A. No, Sir. I am not under obligation to do so.

Tr. p. 436. Q. Did you tender them any ticket? A. No, Sir.

Tr. p. 437. Will you swear that the company provided these men with any food, these Libellants? A. No, Sir.

Tr. p. 437. I ask you was any ticket tendered again, answer yes or no? A. No. Every inducement was offered this appellant corporation to settle with the Libellants. Everything was

done to get some fair treatment, and although the Libellants are men in the humbler walks of life, they were and are entitled to the same consideration as first class passengers so far as the necessaries of life and safe and continuous transportation are concerned.

I respectfully submit these decrees and the evidence in support thereof and this Brief of the appellees to the consideration of this Honorable Circuit Court of Appeals for the Ninth Circuit, and humbly apologize to the Court for not being able to be present to present an oral argument on behalf of these appellees.

Respectfully submitted,

GEO. A. DAVIS,
Counsel for the Appellees.

Dated November 14th, 1906.